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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re W.E., a Person Coming  
Under the Juvenile Court Law.

2d Crim. No. B294735  
(Super. Ct. No. VJ46518)  
(Los Angeles County)

THE PEOPLE,

Plaintiff and Respondent,

v.

W.E.,

Defendant and Appellant.

Fifteen-year-old W.E. hit and injured a salesclerk who demanded that he relinquish stolen merchandise. The juvenile court found that appellant committed robbery, declared him a ward of the court, and ordered home probation for six months. (Welf. & Inst. Code, § 602, subd. (a); Pen. Code, § 211.)

We conclude that substantial evidence supports the court's robbery finding; appellant does not qualify for a pretrial mental

health diversion program designed for adults; and the restitution order is mandated by statute. We affirm.

### **FACTS**

Shamsher Singh worked at a convenience store in Bell. On November 17, 2018, he saw appellant “stealing stuff and putting it in his pocket.” The theft by appellant and a cohort was visible on security cameras.

Appellant placed a bag of chips on the checkout counter. Singh scanned the chips and said, “Give me the other items.” Appellant replied, “I don’t have anything else.” Singh said, “Give me all the items which are in your pockets.” Appellant denied having hidden merchandise and left the store.

Singh followed appellant outside and said, “Give me my stuff back.” Appellant dropped or threw on the ground some of the items in his pockets. Singh told appellant’s companion to pay for a bag of stolen chips he was holding.

Singh tried to grab appellant’s jacket to prevent him from leaving. Appellant struck Singh’s head and genitals. They began tussling on the ground. Police arrived and ended the fight. Singh was in too much pain to stand. An officer searched appellant’s clothing and found a Kit Kat candy bar.

Police photographed blood on Singh’s temple and the candy appellant threw on the ground outside the store. Singh listed the stolen items for police, which included a Kit Kat.

### **DISCUSSION**

#### *1. Substantial Evidence of Robbery*

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

(Pen. Code, §211.) A store employee has constructive possession of merchandise. (*People v. Scott* (2009) 45 Cal.4th 743, 749-754.) Appellant admits to theft inside the store in the presence of an employee, but argues that he did not forcibly deprive Singh of property so that the charge must be “reduced to both a petty theft and an assault.” We disagree. Substantial evidence supports a finding that appellant and a cohort took stolen goods outside the store, where appellant used force to prevent Singh from regaining control of the items.

Assaultive behavior need not be contemporaneous with the taking of merchandise. Robbery begins with taking property and continues “until the robber reaches a place of relative safety.” (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) “A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim’s presence.” (*People v. McKinnon* (2011) 52 Cal.4th 610, 686.) Robbery occurs when a security guard sees the defendant take store merchandise, then follows him outside and confronts him in the parking lot, where the defendant threatens to kill the guard. (*Estes*, at pp. 25-26.)

Appellant was confronted, first at the checkout counter then outside the store, by a store employee who demanded the return of pocketed store property. He tried to detain appellant, who forcibly resisted. Appellant asserts that he abandoned the stolen property before hitting Singh, and that applying force after relinquishing property does not amount to robbery. (*People v. Pham* (1993) 15 Cal.App.4th 61, 68 [“If defendant truly abandoned the victims’ property before using force, then, of course he could be guilty of theft, but not of . . . robbery”].) Appellant cites a case in which the defendant flung a stolen steak

onto a roof while running from supermarket security guards, then struck a pursuer with a rock; it was not robbery because he abandoned the steak before using force. (*People v. Etheridge* (2015) 241 Cal.App.4th 800, 803-804.)<sup>1</sup>

Construing the evidence in the light most favorable to the judgment, the robbery charge is substantiated. The record supports a finding that appellant did not abandon *all* items before hitting Singh. His cohort held a bag of stolen chips (for which Singh demanded payment) and police found a Kit Kat in appellant's pocket after the attack. The trial court viewed surveillance images from which it could see if appellant took a Kit Kat; Singh listed it as a stolen item. Appellant used force to keep stolen property that the victim sought to regain.

## 2. *Pretrial Mental Health Diversion Program*

Citing a program for defendants diagnosed with mental illness, appellant argues that the trial court should determine if he is eligible for pretrial diversion. (Pen. Code, § 1001.35 et seq.)

This diversion program, however, applies to persons charged in “an accusatory pleading” meaning an “indictment, information, or the complaint” in a felony case. (Pen. Code, §§ 949, 1001.36, subd. (a).) Appellant was not charged in such a pleading. He is the subject of a juvenile delinquency petition, which is not a criminal proceeding. (Welf. & Inst. Code, § 203.)

This court recently held that the Penal Code diversion program does not apply to wardship proceedings. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1192-1193.) Instead, there are pre-adjudication procedures for minors. (Welf. & Inst. Code, §§ 791,

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<sup>1</sup> Appellant also relies on a *hypothetical scenario* posed in *People v. Hodges* (2013) 213 Cal.App.4th 531, 543, footnote 4. We decline to treat a hypothetical as precedent.

subd. (b) [the court may refer a case to the probation department or defer judgment if the minor admits the charges and “would be benefited by education, treatment, or rehabilitation”], 711 [court may refer for evaluation a minor with a mental disorder, disturbance or disability].) There are also post-adjudication protections for minors. (*Id.*, § 202, subd. (b) [“Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and the best interest of the public”].) The Welfare and Institutions Code framework encompasses a minor’s mental health and need for education, counseling, and discipline. The rehabilitative options available in this framework serve the purposes of the juvenile law and “distinguish[ ] the adult criminal system from the juvenile justice system.” (*In re M.S.*, *supra*, 32 Cal.App.5th at p. 1193.)

### 3. Restitution Order

The trial court ordered appellant to pay the minimum restitution fine of \$100 for committing a felony plus unspecified victim restitution. (Welf. & Inst. Code, § 730.6, subds. (a)(1)-(2).) The restitution fine is mandatory. (*Id.*, subd. (b) [the court “shall impose” a restitution fine].) Victim restitution is mandated if the victim sustains economic loss. (*Id.*, subds. (a)(1), (h)(1).) The probation report states that Singh sustained a concussion during appellant’s attack. Traumatized, he stopped working at the store and became fearful of going outside. It matters not that the minor lacks the ability to pay. (*Id.*, subds. (c), (h)(1).) Appellant did not claim at the hearing any inability to pay.

**DISPOSITION**

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Kevin L. Brown, Judge

Superior Court County of Los Angeles

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